

Americans with Disability Act

Time to Review and Update Your ADA Compliance Policies

By Edward Sweeney*

For those jail administrators who have not yet developed comprehensive policies for the lawful management of incarcerated individuals with disabilities, there is no time like the present to get your house in order. Equal access and disability discrimination litigations are becoming more common, often resulting in costly payouts and public embarrassment. According to the Bureau of Justice Statistics the concentration of incarcerated individuals with disabilities is three to four times as great as the general public.

ADA Isn't Optional—Everyone Must Follow It

Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA) of 1990, are federal laws designed to protect all people with disabilities from discrimination. The regulations were designed to remedy the serious and pervasive disability-based discrimination that existed throughout society. The Rehabilitation Act of 1973 applies to federal executive agencies, including the Bureau of Prisons, ICE, and to any program that receives federal funding. The ADA was created to regulate state and local government programs, regardless of whether they receive federal funding. Title II of the ADA applies to state and local governments who are responsible for the operation or management of juvenile and adult jails, detention and correctional facilities, and community correctional facilities, whether they are operated directly by the state or local government, or through contracts, licenses, or other arrangements with other entities. Generally, the courts have

interpreted the requirements under Section 504 consistently with those in the ADA.

The law requires correctional staff to make “reasonable accommodations” to ensure that individuals with disabilities are not discriminated against, denied benefits to which they are entitled, or excluded from programs, services, or activities for which they would otherwise be eligible. Correctional facilities are generally required to make activities accessible, as well as provide equipment, medications, and personal devices to

words, a defense strategy that you didn't think a person was disabled, as defined by the Act, so you did nothing further, may well not suffice. When in doubt, engage the individual in an “interactive process” conversation to explore the subject matter fully and document your findings.

Incarcerated persons receiving any disability benefit or accommodation cannot be financially charged for those accommodations. The ADA does state that a public entity does not have to provide an accommodation that places an “undue

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accommodate the individual's disability. In the event of a legal challenge the court will consider how the jail responded to the recognized or professed disability; what interactive process communications or other steps did they take to investigate and consider the provision of a reasonable accommodation? If a satisfactory accommodation was not provided, as perceived by the person with the disability, the jail will need to explain their rationale.

The Law Defines “Disability” Broadly—With Reason

The legal definition of what constitutes a disability is purposefully broad. In simple terms, a disability is a condition that substantially limits a major life activity or major bodily function. Some examples of conditions that plainly qualify as a disability include deafness, blindness, partially or completely missing limbs, mobility impairments, autism, and intellectual disability. Many other conditions are described in the Act and some specific conditions are expressly excluded from the definition. In cases where a lawsuit has been brought, the primary consideration has often been whether the entity complied with their legal obligations and whether discrimination has occurred, not whether the individual meets the definition of “disability.” In other

burden” on the facility or requires a “fundamental alteration” to the program. Whether an accommodation is reasonable depends on many individual factors and circumstances. Before taking such a position, I highly recommend a detailed discussion with legal counsel.

For correctional managers the initial assembly of written policies and organized processes for the proper management of incarcerated individuals with disabilities can appear daunting but taking the time to establish and memorialize related practices will be well worth the effort; keep in mind that “there is only one way to eat an elephant, and that's one bite at a time.”

Steps to Compliance

First, prepare an overarching policy that captures the requirements outlined in the ADA. There are many examples of such policies available on the web and from your respective state departments. The American Correctional Association has information relating to disability in their Adult Local Detention Facilities standards manual as does the National Commission on Correctional Health Care. Expect to modify the policy several times in the first few years as your procedures become more comprehensive and detailed.

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Second, designate a manager as your local expert on the ADA and see that this individual is then properly educated and trained. I would recommend your highest-ranking staff member who oversees classification and interacts often with medical staff. This person should be in addition to the physical plant manager who should be fully trained on ADA Standards for Accessible Design and the Architectural Barriers Act.

Third, utilize your staff expert or bring in an outside specialist to start training your entire staff regarding their obligations pertaining to individuals with disabilities. Most states have governmental resource staff who are available to provide the training directly or provide materials and assistance for in-house trainers.

While staff training is ongoing, the appointed ADA manager should perform an intensive "self-evaluation" of existing related services, policies, and practices to identify areas of deficiency. Whenever possible, the self-evaluation process should include interactions with disabled individuals and/or agencies who represent them. A self-evaluation plan may well span several years, BUT as areas of concern are identified, a plan of action to address it should be fashioned, put into practice, and memorialized into policy.

Communicate with State and County Departments Whose Expertise Can Help

Developing contacts at your courthouse and your state/county human services department will prove to be very helpful in resolving many issues. Common issues to be resolved and systems to be established include: instituting a screening process

for new commitments to identify persons with disabilities; formalizing individual interactive process communications and associated grievance procedures; expanding handbook language regarding disability rights; installing grab bars and other required mobility features in select cells of all classification levels; changing classification decision making to integrate individuals with disabilities into living environments and programs; providing and allowing for the broad use of wheelchairs, canes, walkers, etc.; utilizing wheelchair accessible transport vehicles for non-emergency transports; expanding the availability of medical devices, equipment and services; providing effective communication methods and/or instruments for vision and hearing impaired including sign language interpreters, document conversions (braille, large print, etc.), eyeglasses, and auxiliary aids for communication (TTY machines, audio readers, hearing aids, etc.)

As individuals with disabilities are identified it is critical to engage him or her in an interactive communication process to ascertain a full understanding of the subject's disability and what accommodations may be appropriate. Just because a disabled individual hasn't asked for an accommodation doesn't mean you are not obligated to offer one. If a person has a known or obvious disability you need to talk with that person about what limitations they have, and what mitigation measures, or accommodations you can provide. When engaging in the interactive process it is important to keep detailed notes of the conversations and outcomes.

"Reasonable Accommodation" in the Correctional Environment

A primary intention of the ADA, as applied to a correctional environment, is to

ensure that a person who would otherwise qualify for a housing classification, program participation, privileges, recreation, etc. is not denied due to their disability. In other words, a "qualified" or "similarly situated" person with a disability cannot be discriminated against due to their disability. It is incumbent upon the corrections staff to figure out what reasonable accommodations are needed to make it work.

Unlike other public entities, correctional facilities are unique in that incarcerated individuals cannot leave. If the facility staff fail to afford the proper accommodations, disabled individuals have little recourse. Legal actions stemming from disability discrimination claims can be initiated by the U.S. Department of Justice, state disability rights network groups, private attorneys, or pro se plaintiffs. In addition to the ADA and/or Section 504 of the Rehabilitation Act, litigants will likely file a 1983 action for violation of their constitutional civil rights (8th and 14th Amendments) and perhaps reference the Civil Rights of Institutionalized Persons Act (CRIPA), which prohibits a practice or pattern of deprivation of constitutional rights of individuals who are confined in state or local government-run correctional facilities. Allegations that a person was retaliated against for raising an ADA protected concern or that the person was coerced to not fully pursue his or her rights, will be very closely examined by courts.

As with any fundamental change to operations there may well be some staff resistance to particular actions, but the law, along with the associated professional standards and resource materials are clear and strong. All it will take is some time, commitment, and leadership to consume the full proverbial elephant. ■



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